

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GEORGE MAVRIK	:	ORDER
	:	DTA NO. 819065
for Redetermination of a Deficiency or for Refund of	:	
New York State Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1996.	:	

Petitioner, George Mavrik, P. O. Box 187, Bonsall, California 92003, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the year 1996.

On July 12, 2002 the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On July 22, 2002, petitioner, appearing *pro se*, submitted a letter in response to the notice. On August 9, 2002, the Division of Taxation, appearing by Barbara G. Billet, Esq. (John E. Matthews, Esq., of counsel), submitted documents in support of dismissal. After due consideration of the documents submitted, Winifred M. Maloney, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals.

FINDINGS OF FACT

1. Petitioner, George Mavrik, filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services ("BCMS") seeking review of a Notice and Demand for Payment of Tax Due for the year 1997 pursuant to Article 22 of the Tax Law.

2. A conciliation conference was scheduled in the above matter on February 5, 2002. However, neither petitioner nor a duly authorized representative of petitioner appeared at the conciliation conference. Therefore, by Conciliation Default Order (CMS No. 187205) dated March 22, 2002, the statutory notice was sustained.

3. On June 28, 2002, the Division of Tax Appeals received the petition in this matter. The envelope containing the petition bore a United States Postal Service ("USPS) postmark of June 25, 2002.

4. On July 12, 2002, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner with a copy to the Division of Taxation ("Division"). The notice states:

You are hereby notified of our intent to dismiss the petition in the above referenced matter.

Pursuant to § 170.3-a(e) of the Tax Law, a petition must be filed within ninety days from the date a Conciliation Default Order is issued.

The Conciliation Default Order was issued on March 22, 2002 but the petition was not filed until June 25, 2002 or ninety-five days later.

Pursuant to § 3000.9(a)(4) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, the parties shall have thirty days from the date of this Notice to submit written comments on the proposed dismissal.

5. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division submitted the affidavits of Carl DeCesare and Daniel LaFar, employees of the Division. The affidavit of Carl DeCesare, Assistant Supervisor of Tax Conferences in BCMS, sets forth the Division's general procedures for preparing and mailing out conciliation default orders. The affidavit of Daniel LaFar, Principal Mail and Supply Clerk in the Division's Mail Processing Center, attests to the regular procedures followed by the mailroom staff in the ordinary course of

business of delivering outgoing certified mail to branch offices of the USPS. Findings of Fact “6” through “13” are taken from their affidavits.

6. All conciliation default orders mailed within the United States are sent by certified mail. The Division’s Data Management Services Unit prepares each conciliation default order and an accompanying cover letter. The computer-generated conciliation default order and cover letter are predated with the anticipated date of mailing. From electronically pulled data, the Advanced Function Printing Unit (“AFP”) assigns a certified control number to each order and produces a cover sheet that contains the following information: the Division’s return address, the anticipated date of mailing, the taxpayer’s name and mailing address, a control number assigned by BCMS (the “CMS” number), a certified mail control number and a certified number bar code. The AFP Unit produces a computer-generated document entitled “ASSESSMENTS RECEIVABLE CERTIFIED RECORD FOR NON-PRESORT MAIL” (“CMR”). The CMR is a listing of taxpayers to whom conciliation default orders are to be sent by certified mail on a particular day. The certified control numbers are recorded on the CMR under the heading “CERTIFIED NO.” On the last page of the CMR there are spaces to record the “TOTAL PIECES AND AMOUNTS LISTED” and the “TOTAL PIECES RECEIVED AT POST OFFICE.”

7. The Data Management Services Unit forwards the conciliation default orders and cover letters to BCMS where they are reviewed and signed by the appropriate conciliation conferee. The conferee then forwards the signed Conciliation Default Order and the cover letter to a clerk assigned to process conciliation default orders. The AFP Unit forwards the CMR and cover sheets to the BCMS clerk assigned to process conciliation default orders.

8. The BCMS clerk associates each cover sheet provided by the AFP unit with the appropriate Conciliation Default Order and covering letter. The clerk verifies that the information on the cover sheet, the respective conciliation default order and the cover letter are the same. All three are then folded and placed in a three-windowed envelope which allows the Division's return address, the certified mail control number, the bar code and the name and address of the taxpayer to show. The clerk then places a stamp at the top center of each page of the CMR stating the date the conciliation default orders were mailed which in this case is March 22, 2002.

9. The CMR, along with the envelopes, are picked up in the BCMS office by an employee of the Division's Mail Processing Center. After a conciliation default order is placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a staff member weighs and seals each envelope and places postage and fee amounts on the letters. Thereafter, a mail processing clerk counts the envelopes and verifies the names and certified mail numbers against the information contained on the CMR. Once the envelopes are stamped, a member of the mail processing center staff delivers them to a branch of the USPS in Albany. The postal employee affixes a postmark and his initials or signature to the certified mail record, indicating receipt by the Postal Service. The CMR becomes the Division's record of receipt by the USPS for the items of certified mail listed on that document. In the Division's ordinary course of business, the certified mail record is picked up at the post office the following day and is delivered to the originating office, in this case BCMS, by a Mail Processing Center staff member. The Division's mail processing center returned a copy of the CMR to BCMS with a postmark affixed showing the date of mailing. The CMR is kept in BCMS as a permanent record.

10. Mr. DeCesare states that the copy of the five-page CMR attached to his affidavit is a true and accurate copy of the original. Portions of the CMR have been redacted to protect the confidentiality of the taxpayers listed on the CMR. It contains a list of the conciliation default orders allegedly issued by the Division on March 22, 2002. There are 41 certified mail control numbers on this document. They do not run consecutively. Petitioner's name and address appear on page 5 with the certified mail control number 7104 1002 9739 0081 1597 appearing next to his name.

11. Each of the five pages of the CMR is date stamped March 22, 2002 by the Stuyvesant Plaza branch of the USPS in Albany, New York. On page five, the number "45" has been entered as the "TOTAL PIECES AND AMOUNTS LISTED." A line has been drawn through the number 45. The total number of pieces received at the post office shows "41" in order to reflect the fact that four pieces of certified mail had been "pulled" from the mailing record. The pieces that were "pulled" are listed on page 1 of the CMR. Lines were placed through the entries for the taxpayers after the statutory notices were "pulled." A piece of mail may be "pulled" for any number of reasons including, but not limited to, a discrepancy in a name or address. Any piece of mail so "pulled" will be segregated from the remaining group of statutory notices for correction and issuance at another time.

12. The following stamp appears at the bottom left-hand corner of each of the pages of the CMR:

MAILROOM: RETURN LISTING TO: BCMS BLDG 9 RM 180
ATT: CONFERENCE UNIT

The following stamp appears at the bottom right-hand corner of each of the pages of the CMR:

POST OFFICE

Hand write total # of pieces and initial.

Do Not stamp over written areas.

13. The stamps are placed on the CMR by the BCMS clerk. The clerk also writes on each page of the CMR the total number of pieces listed by the sender. In this case, the clerk wrote “7 pieces this pg by sender” on page 1 of the CMR, “11 pieces this pg by sender” on pages 2, 3, and 4 of the CMR and “1 piece this pg by sender” on page 5 of the CMR. On page 1 of the CMR, the number 7 is written directly below the lower right-hand corner stamp described directly above. The initials D.D. appear next to the number seven. The number 11 and the initials D.D. appear to the right of the top of the lower right-hand corner stamp on page two of the CMR. The number 11 and the initials D.D. appear directly below the lower right-hand corner stamp on pages three and four of the CMR. The number 1 and the initials D.D. appear directly beneath the lower right-hand corner stamp on page five of the CMR. Also on page five, the number “41” has been written as the “TOTAL PIECES RECEIVED AT POST OFFICE.” The fact that a Postal Service employee wrote the number of pieces listed on the CMR to indicate the number of pieces received was established through the affidavit of Mr. LaFar based on his knowledge that the Division’s Mail Processing Center requested that Postal Service employees either circle the number of pieces received or indicate the total number of pieces received by writing the number of such pieces on the CMR.

14. Attached to Mr. DeCesare’s affidavit is a copy of the Conciliation Default Order (CMS No. 187205) dated March 22, 2002, which dismissed petitioner’s request and sustained the statutory notice.

15. In response to the Notice of Intent to Dismiss Petition, petitioner submitted a letter stating that to the best of his knowledge his petition was filed in a timely manner.

CONCLUSIONS OF LAW

A. A conciliation default order is binding on both the Division and the taxpayer unless the taxpayer petitions for a hearing within 90 days from the date of the issuance of the conciliation default order (Tax Law § 170[3-a][e]). A conciliation default order is “issued” within the meaning of Tax Law § 170(3-a)(e) at the time of its mailing to the taxpayer (*Matter of Trans County Constr.*, Tax Appeals Tribunal, August 24, 1995; *Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). The filing of a petition within this time frame is a prerequisite to the jurisdiction of the Division of Tax Appeals which has no authority to consider a petition which is not filed within 90 days of the issuance of a conciliation default order (*Matter of Roland*, Tax Appeals Tribunal, February 22, 1996).

B. Where the taxpayer files a petition, but the timeliness of the petition is at issue, the Division has the burden of proving proper mailing of the conciliation order (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). The mailing evidence required of the Division is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of orders by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*).

The affidavits of two Division employees, Carl DeCesare and Daniel LaFar, provide adequate proof of the Division’s standard mailing procedure for the mailing of conciliation default orders by certified mail. The affidavits generally describe the various stages of producing and mailing conciliation default orders, and, in addition, attest to the authenticity and accuracy of the copies of the conciliation default order and the certified mail record submitted as

evidence of actual mailing. These documents establish that the general mailing procedures described in the DeCesare and LaFar affidavits were followed with respect to the Conciliation Default Order issued to petitioner. Petitioner's name and address appear on page five of the certified mail record which bears a USPS date stamp of March 22, 2002 along with the initials of a Postal Service employee. There are 41 certified mail control numbers listed on the CMR, and the USPS employee indicated that he received 41 items for mailing. The Division has, therefore, established that it mailed the Conciliation Default Order to petitioner by certified mail on March 22, 2002.

C. The envelope containing petitioner's petition bears a postmark of June 25, 2002. In accordance with 20 NYCRR 3000.22(b), the Division of Tax Appeals treated this date as the date of filing of the petition. Accordingly, it is found that the petition was filed more than 90 days after the mailing of the Conciliation Default Order. Since the petition was not mailed to the Division of Tax Appeals within the statutory 90-day period, the Division of Tax Appeals has no authority to hear petitioner's challenge to the Conciliation Default Order.

D. Finally, it is noted that petitioner is not without recourse here, for he may pay the disputed tax and, within two years from the date of payment, apply for a refund (Tax Law § 687[a]). If his request for a refund is denied, petitioner may then proceed with another petition requesting a hearing or a conciliation conference (Tax Law § 689[c]; § 170[3-a][a]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).

E. The petition of George Mavrik is dismissed with prejudice.

DATED: Troy, New York
September 19, 2002

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE